# ESSENTIAL ACTIVITIES, SOCIAL DISTANCING AND ADI Nº 6.341: CONSEQUENCES OF COVID-19

# *ATIVIDADES ESSENCIAIS, DISTANCIAMENTO SOCIAL E ADI Nº 6.341: CONSEQUÊNCIAS DO COVID-19*

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## ABSTRACT[1]

**Objective**: The article aims to reflect on the existing correction between the definition of essential activities and social distance and, from them, to point out reflexes of this decision in relation to the federative pact, resulting from the judgment of ADI nº 6341, at the time of COVID-19.

**Methodology**: The research will be analyzed through the bibliographic review of articles and doctrinal material raised, including, from health protocols adopted by European countries, regarding issues related to social distance, as well as the Supreme Court's own decision in ADI nº 6341.

[1] Structure of the expanded summary as SILVA, *et al*. (2020).


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

**Results**: Under the formal aspect, the social distancing health measure, like the other measures, could, in theory, be carried out by the health authorities of the federated entities, however, as it was not expressly listed in law, having its validity basis in an infra-legal act (epidemiological bulletins from the Health Ministry), so that, as a measure that restricts rights, it could not be conveyed through regulatory decree of states and municipalities.

**Conclusions**: From the study it is concluded that the adoption of autonomous decrees to implement the measure of social distance is inadequate, with no legal basis.

**Keywords:** Federative pact; Autonomous decrees; Essential activities; Social distancing; Public health.

***RESUMO***

***Objetivo:*** *O artivo visa refletir sobre a definição de atividades essenciais e distância social e, a partir delas, apontar reflexos dessa decisão em relação ao pacto federativo, decorrente do julgamento da ADI nº. 6341, na época do COVID-19.*

***Metodologia:*** *A pesquisa será analisada por meio da revisão bibliográfica de artigos e material doutrinário levantado, inclusive, a partir de protocolos de saúde adotados por países da Europa, quanto às questões relativas ao distanciamento social, bem como a própria decisão do Supremo Tribunal Federal na ADI nº 6341.*

***Resultados:*** *Sob o aspecto formal, a medida sanitária de distanciamento social, como as demais medidas, poderia, em tese, ser levada a efeito pelas autoridades sanitárias dos entes federados, no entanto, por não ter sido elencada expressamente em lei, tendo seu fundamento de validade em ato infralegal, de modo que, como medida que restringe direitos, não poderia ser veiculada mediante decreto regulamentar de estados e municípios.*

***Conclusões****: Conclui-se que a adoção de decretos autônomos para implementar a medida de distância social é inadequada, sem base legal.*

***Palavras-chave:*** *Pacto Federativo. Decretos autônomos. Atividades essenciais. Distanciamento social. Saúde pública.*

## 1 INTRODUCTION

This article aims to reflect on the existing correlation between the definition of essential activities and social distance and, from them, to indicate some points of


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

view on the federative pact, resulting from the judgment of the Unconstitutionality Direct Action (ADI) nº 6341 (BRASIL, 2020m), especially in times of Coronavirus / COVID-19.

The theme is important since it is current, although, under the aspect of the federative pact, it does not prove to be anything innovative. It finds relevance, therefore, under the aspect of the miscellany of acts edited by the Executive Powers of all the federal entities, aiming to indicate what would be the essential activities, which has been generating difficulty in cohesion and coherence in decision making by public managers, especially having in mind the municipal managers and the supervenience of the electoral period, in a completely atypical year, not only in national terms, but worldwide.

It is expected, with the considerations mentioned here, to identify the consequences resulting from the judgment by the Supreme Federal Court of ADI nº 6341, especially regarding the fragility caused to the federative pact, offense to the tripartition of State functions and fundamental rights.

The research will be analyzed through bibliographic review of articles and doctrinal material raised, including, from health protocols adopted by European countries, regarding issues related to social distance, as well as the Supreme Court's own decision in ADI nº 6341.

## 2 ESSENTIAL ACTIVITIES

Before specifically addressing essential services and activities, it is important to contextualize the discussion as to the current moment that society, at a global level, is going through. It is a unique moment in the most recent history of mankind, when, in global terms, the context of daily life of all people, in all countries, has changed profoundly, resulting from a pandemic process, which has affected not only health, but the economic order (in macro and microeconomic terms), the social order and, in many places, as in Brazil, the political order.


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

The pandemic situation, understood as a worldwide expansion of an epidemiological process that was once localized and which has become uncontrolled, has caused a worldwide change in human habits in every sense of existence.

> Since the beginning of the current coronavirus outbreak (SARS-CoV-2), which caused Covid-19, there has been great concern in face of a disease that has spread rapidly in various regions of the world, with different impacts. According to the World Health Organization (WHO), on March 18, 2020, confirmed cases of Covid-19 had already surpassed 214,000 worldwide. There were no strategic plans ready to be applied to a coronavirus pandemic - everything is new. Recommendations from WHO, 1 from the Health Ministry of Brazil, from the Centers for Disease Control and Prevention (CDC, United States) 2 and other national and international organizations have suggested the application of influenza contingency plans and their tools, due to clinical similarities and epidemiological factors among these respiratory viruses. These contingency plans provide for different actions according to the severity of the pandemics. (FREITAS; NAPIMOGA; DONALISIO, 2020, p.1).

In Brazil, the emergency in public health of national importance was declared by Ordinance GM/MS Nº. 188, of February 3, 2020 (BRASIL, 2020b), in accordance with Decree Nº. 7,616/2011 (BRASIL, 2011), and later, Federal Law Nº. 13,979/2020 (BRASIL, 2020a) was issued, which laid down measures to combat the emergency in public health of international importance, resulting from Coronavirus.

Federal Law Nº. 13,979/2020 (BRASIL, 2020a) was established with the objective of protecting the collectivity granting powers the Health Minister, by administrative act, to tackle with the emergency, which was accomplished through Ordinance GM/MS Nº. 356 of March 11, 2020 (BRASIL, 2020c), which, in turn, regulated the operationalization of said legislation and established measures to combat the public health emergency.

In this respect, Federal Law Nº. 13,979/2020 (BRASIL, 2020a) brings some definitions on the restrictive sanitary measures that could be adopted to combat the pandemic in national territory, ensuring the need for operation of essential services and activities and asserting that the President would dispose on the essential services and activities through decree, an increase carried out through Provisional


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

Measure Nº. 926 of March 20, 2020 (BRASIL, 2020d). This legislation was subsequently regulated by Federal Decrees Nº. 10,282 of March 20, 2020 (BRASIL, 2020e) and Nº. 10,288, of March 22, 2020 (BRASIL, 2020f).

It is important to note that both Provisional Measure Nº. 926, dealing with the possibility of the President to edit Federal Decree Nº. 10,282, and this second, to deal with essential services and activities, were introduced into the normative system on the same day.

Federal Decree No. 10,282/2020 was issued to define public services and essential activities, according to the disposition of Art. 84, item IV, of the Constitution of the Federative Republic of Brazil of 1988 (CF) (BRASIL, 1988). In its Art. 3, §1, items I to LVII, it casts an exemplifying list, establishing the expression "such as". This list was expanded, throughout the epidemic period, through supplementary decrees, which have changed the activities considered[2] essential.

It is observed, thus, of §2º, of the same Art. 3º (BRASIL, 2020e), that "the ancillary and supporting activities, and the availability of the necessary supplies to the production chain, related to the exercise and operation of public services and essential activities" would also be considered essential.

According to the prediction of Art. 3, §1 (BRASIL, 2020e),

> […] public services and essential activities would be those indispensable to meet the unavoidable needs of the community, thus considering those that, if not attended, endanger the survival, health, or safety of the population.

In addition, Article 3, §9º (BRASIL, 2020e), established that the amount mentioned in the remainder of the provision "would not withdraw the competence or taking of normative and[3] administrative measures by the States, the Federal District, or the Municipalities, within the scope of their respective competencies and their respective territories, for the purposes of the provisions of Art. 3 of Law Nº. 13,979/2020", if they are observed.

[2] See Decrees No. 10,292/2020, no. 10,329/2020, no. 10,342/2020, and no. 10,344/2020.
[3] Norm inserted by subsequent Decree under no. 10,329, of April 28, 2020.


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

> I - the exclusive competence of the Union to establish the measures provided for in Law Nº. 13,979/2020, relating to the use of its goods and the provision of essential public services granted by it; [as well as] II - that the adoption of any limitation to the provision of public services or to the performance of other essential activities directly regulated, granted or authorized by the Union only [could be adopted in prior coordination with the regulatory body or the Granting Or Authorizer Power of the Union] (BRASIL, 2020e)

In addition, it cannot be overlooked that Decree Nº. 10,288/2020 (BRASIL, 2020f) dealt with the essential activities and services related to the press, according to which, in its Art. 3, restrictive sanitary measures should be

> [...] to safeguard the full exercise and operation of activities and services related to the press, since they are considered essential in the provision of information to the population, in order to give effectiveness to the constitutional principle of publicity in relation to the acts performed by the State, being essential the activities and services related to the press, by all the media and dissemination available , including the broadcasting of sounds and images, the Internet, newspapers and magazines, among others, in addition to ancillary and support activities and the availability of the necessary supplies to the production chain, related to activities and press services (BRASIL, 2020f).

It is important to note two aspects related to activities and services considered essential. The first, regarding the fact that Provisional Measure Nº. 926/2020 (BRASIL, 2020d), which introduced Art. 3, §8 and §9 (described above), to Federal Law Nº. 13,979/2020 (BRASIL, 2020a), was extended by the Board of Directors of the National Congress, in 05/07/2020, with a period of another 60 days, therefore, lasting until 07/06/2020.

Consulting its procedure in the National Congress, it is stated that, in 09/07/2020, there was presentation of the Plenary preliminary opinion, understanding by its formal and material constitutionality, admitting it as to the constitutional assumptions of relevance and urgency, removing some parliamentary amendments not appropriate and welcoming others partially or wholly, including a proposal for a text of law annexed to the opinion (BRASIL, 2020d). In this respect, it is important that the project provides for the adoption of the measures envisaged,


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

> […] to safeguard the supply of products, the exercise and operation of public services and essential activities, as defined in decree of the respective federative authority, maintaining the sealing or restriction to the action of workers that may affect the operation of public services and essential activities, defined as essential in addition to loads of any kind that may lead to shortage of essential necessary to the population (BRAZIL, 2020a).

When this paper was initially written in July/2020, it was found that there was no information that this provisional measure had been converted into law, in accordance with both legislative houses. An important aspect at that time, because such a legislative act had an eminently precarious character, so that it would last for as long as its validity period was maintained or extended and would end up losing its validity if the National Congress did not convert it into law in due course.

> The provisional measure not converted into law in sixty days (or even after it has been extended once) or rejected loses its effects since its edition ("ex tunc" effects). The National Congress, in this case, has a period of sixty days to, by legislative decree, discipline the relations arising from the incidence of the provisional measure that has lost its effectiveness (either by non-assessment or by rejection). If the National Congress does not manifest itself within sixty days, the sayings of the provisional measure will be valid for the relations in that time interval. This is a sad restoration of the expiry of the term institute, banned with the 1988 Constitution. (ARAÚJO; NUNES JÚNIOR, 2006, p. 371-373)

However, in a more recent consultation, it is noted that the National Congress converted into law the provisional measure that authorized the President to edit, by decree, the activities considered essential, as verified by Law Nº. 14.035, from August 11, 2020 (BRASIL, 2020n). It means that, currently, the provisions of Art. 3, §§ 8 to 11, introduced by Provisional Measure Nº. 926/2020 converted into Law Nº. 14,035/2020 (BRASIL, 2020n), as well as Decrees Nº. 10,282, nº. 10,288, and subsequent amendments, remain valid.

The second aspect to be observed is that there was a definition of essential services related to the care of women in situations of domestic and family violence, as well as children, adolescents, elderly and people with disabilities, through Federal Law Nº. 14,022, of July 7, 2020 (BRASIL, 2020h). The Legislative Power edited rules


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

based on agendas and criteria that it considered inappropriate to meet the needs of the population.

The Legislative Power also acted while editing Law Nº. 14,023 of July 8, 2020 (BRASIL, 2020g), which established responsibility to public authorities, employers and contractors for the adoption of measures to preserve the health of professionals considered essential to disease control and maintenance of public order, specifically enumerating them. That is, it has defined, by law, the professionals it considers essential in this pandemic period. The Legislative had not yet regulated what would be the so-called essential activities and services, in relation to this period of epidemic, a situation already elucidated and defined by the conversion of the provisional measure into law.

Thus, how are essential activities and services defined, since, currently, Decree Nº. 10,282/2020 (BRASIL, 2020e) has 57 different items? What public and private activities could and/or should continue to operate during the covid-19 epidemic?

The Brazilian Federal Constitution of 1988 (BRASIL, 1988), when dealing with social rights, especially regarding labor relations, guaranteed, in Art. 9, §1, the right to strike, and there is a determination that law defines which are the essential services or activities and indicates how the unavoidable needs of the community will be taken care of.

From this it can be extracted a constitutional foundation as to the existence of services and activities whose continuity is essential to meet social needs, desiring the original constituent that the ordinary legislature could enumerate the list of such activities, through due legislative process.

As soon as the CF of 1988 was promulgated (BRASIL, 1988), Federal Law Nº. 7,783/89 (BRASIL, 1989) was issued, which laid down "the exercise of the right to strike and defined the essential activities", regulating the fulfillment of these unavoidable needs of the community. By this law, those listed in Art. 10, items I to XV, with the sole paragraph, according to which would be unavoidable needs of the community, those that, unmet, would endanger the survival, health, or safety of the


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

population. Such legal rule can and should be used as a beacon for the definition of essential activities and services.

That is, even though the Law Nº. 7,783/89[4] (BRAZIL, 1989) provides for only fifteen items indicating which activities would be essential and Decree Nº. 10,282/2020 provides for fifty-seven different activities, apart from Decree Nº. 10,288/2020, which deals with the essential activity of printing, it is important to note that all these normative instruments understand that the essential activities are those related to the unavoidable needs of the community, needs that if not met may put at risk the survival, health and safety of the population. It is worth adding that there is a very current provision of two laws mentioned above that deal with the services provided to women victims of domestic and family violence, against children, elderly and disabled people, in addition to that which includes the essential professionals to health and public safety activities.

Then, despite all the recent discussion on the definition of essential services and activities, for the purposes of what is addressed in this work, it will be adopted, in addition to what already mentions the laws on essential activities cited elsewhere, those activities and services related to the unavoidable needs of the community, needs which, when not supplied, put at risk the survival, health and safety of the population.

## 3 SANITARY RESTRICTIVE MEASURE OF SOCIAL DISTANCING

Sanitary restrictive measures can be carried out by the health authorities of the municipalities, states, and the Union, as verified by Art. 3, §7, of Law Nº. 13,979/2020 (BRASIL,2020a), that is, by act of the Federal Executive Power, states, and municipalities.

The adoption of restrictive sanitary measures, whatever they may be, must be determined based on scientific evidence and analyses of strategic information on

[4] It does not concern the discussion about the list of Art. 10, Law No. 7,783/89 whether to be definitive or exemplary, since this would greatly expand the object of this study.


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

health and should be limited in time and space to the minimum necessary for the promotion and preservation of public health, as provided for in Article 3, §1, of Federal Law Nº. 13,979/2020 (BRASIL,2020a).

Isolation, that is "the separation of *sick* or *contaminated* persons, or baggage, means of transport, goods or affected postal parcels, of others, is considered to avoid contamination spread of coronavirus" (BRASIL, 2020a), it is "a measure aimed at separating symptomatic or asymptomatic people, in clinical and laboratory research, to prevent the spread of infection and local transmission" (BRASIL, 2020c). Moreover, "it can only be determined by medical prescription or recommendation of the epidemiological surveillance agent, for a maximum period of 14 days (extendable for the same period)", being "preferably performed at home, and can be done in public or private hospitals, according to medical recommendation and patient status" (BRASIL, 2020c). Such measure should be accompanied by a free and informed consent form of the patient. When recommended by the health surveillance agent, or, in his absence, by the Secretary of Health, it will be made by express notification to the contacting person, duly substantiated.

The quarantine measure means "the restriction of activities or separation of people suspected of contamination of people who are not sick, or of luggage, containers, animals, means of transport or goods suspected of contamination, in order to avoid possible contamination or spread of coronavirus" (BRASIL, 2020a). In turn, it aims to ensure the maintenance of health services in a certain and specific place (BRASIL, 2020c). In other words, both measures mentioned are aimed not only at avoiding the chain of transmission of the disease, but also, from the reduction of contagion, to preserve the health system itself.

It happens that, in general, social isolation/social distancing/home isolation has been mentioned, which is not confused either with the isolation of the patient affected by the disease (art. 3, item I), nor with the quarantine determined to people suspected of contamination (art. 3, item II) (BRASIL,2020a). It is not confused because social distancing is imposed on all subjects, even if they are not affected or suspected of involvement by the virus.


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

It is a new measure, hereinafter, for the purposes of this work, called only social distancing, which could be adopted by managers, since the measures mentioned in Art. 3 of the Federal Law (BRASIL,2020a) are not, in the thesis, definitive.

As observed in Epidemiological Bulletin Nº. 5 of 14/03/2020 (BRASIL, 2020i), of the Health Ministry, a non-pharmacological sanitary measure was adopted to preserve the health system, and there was an express prediction that, in Wuhan/China, where the epidemic began, "home quarantine" would have been applied to the entire population, in a similar way to what was designated in Brazil as social distancing.

And, although there is no express provision of such a restrictive sanitary measure in the Brazilian legal list, it is recommended to be used by several entities, one of which is the World Health Organization (WHO, 2020).

In addition, Epidemiological Bulletin Nº. 5 of 03/14/2020 (BRASIL, 2020i), of the Health Ministry, recommended, in addition to other aspects, that "quarantine declaration be promoted only when 80% of the intensive care unit (ICU) bed occupancy, available for response to COVID-19, defined by the local manager according to Ordinance GM/MS Nº. 356/2020" (BRASIL, 2020c, p. 10-11). So, until this level of ICU bed occupancy was reached, the determination of social distancing would still remain in force, that is, regardless of the application or not of quarantine, the measure of social distancing would be imposed.

It means that the restrictive sanitary measure called social distancing would not be one of the measures legally provided for, although globally adopted as a non-pharmacological way to control the transmission of the disease and try to prevent the collapse of the health system.

Epidemiological Bulletins Nº. 7 of 04/06/20 (BRASIL, 2020j) and Nº. 8, of 04/09/2020 (BRASIL, 2020k), of the Health Ministry, in which it was indicated, for the first time and expressly in an official document, the prediction of the non-pharmacological measure of social distancing, not indicating exactly the criteria for its


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

adoption, but levels of implementation, among which the increased social distancing, selective social distancing and lockdown:

> Expanded Social Distancing (ESD) Strategy not limited to specific groups, requiring all sectors of society to remain in residence for the duration of the enactment of the measure by local managers. This measure restricts contact between people as much as possible. [...] Selective Social Distancing (SSD) A strategy where only a few groups are isolated, being selected the groups that present the most risk of developing the disease or those that may present a more severe condition, such as the elderly and people with chronic diseases (diabetes, heart disease, etc.) or risk conditions such as obesity and risk pregnancy. People under 60 years of age can move freely if they are asymptomatic. [...] Lockdown. This is the highest level of security and may be necessary in a situation of serious threat to the Health System. During a full lockdown, ALL perimeter entrances are blocked by security professionals and NO ONE is allowed to enter or leave the isolated perimeter. (BRASIL, 2020j, p. 5-7)

Nor can it be said that the measure of social distancing would be one of the forms of quarantine measure in order to solve its formal problem. It cannot be because the criteria for the adoption of this and that were differentiated, as verified in epidemiological bulletins Nº. 5, of 03/14/2020 (BRASIL, 2020i), and Nº. 11, of 04/17/2020 (BRASIL, 2020l). For quarantine, the criterion was the achievement of 80% of beds for the treatment of COVID-19, while for social distancing, a risk criterion was adopted considering the incidence of COVID-19 per 1 million inhabitants and percentage vulnerability of occupied ICU beds.

It is perceived, then, that the measure of social distancing is not a legal measure and expressly provided for by law, but that it has been widely used, having its validity based upon an infralegal act, consistent in epidemiological bulletins of the Health Ministry. But what are the problems that have been caused under the aspect of the federative pact, with the adoption of social distancing measures by the three federative entities? This is the question that aims to be answered in the item that will deal with the consequences of the adoption of the measures by the municipalities and states.


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

## 4 JUDGMENT OF DIRECT ACTION OF UNCONSTITUTIONALITY N. 6.341

A Direct Action for the Declaration of Unconstitutionality was promoted by the Democratic Labor Party, arguing the unconstitutionality of Provisional Measure Nº. 926/2020 (BRASIL, 2020d). The action had as scope to assess who would have the competencies for: a) realization and implementation of restrictive sanitary measures and b) to say about essential activities and services.

It is perceived that although it has elaborated a whole understanding on the theme of the application of restrictive sanitary measures and its competence for the execution of public policy, the Constitutional Court did not refer to the competence of those who should edit the regulation on essential services. This is the problematic issue of that decision. This is because it is one thing to say to whom the CF (BRASIL, 1988) assigns competence to the implementation of restrictive sanitary measures, another is to say who is constitutionally responsible to say what are the essential services.

Minister Marco Aurélio decided on the action stating the attribution of all states and municipalities to regulate health issues, basically using the mention of Art. 23, item II, of the CF (BRASIL, 2020m), which asserts that there is a common competence between the Union, states, and municipalities to take care of public health. It happens that, for this cooperative competence, there must be complementary law, which fixes the rules of cooperation, with a view to balancing development and well-being at the national level.

It is a legislative competence, therefore, not directed to the executive branch, but to the legislative branch of each federative entities. Moreover, to date, there is no Complementary Law on the subject, with the case for the Epidemic of International Importance on COVID-19. This is because both Law Nº. 13,979/2020, which dealt specifically with the issue, and the Organic Health Law under Nº. 8,080/90 (BRASIL, 1990), which deals with the distribution of competencies among federal entities, are both ordinary laws and refer to executive competence and not to legislative competence among the entities of the federation.


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

Then, for the purposes of implementing sanitary measures, both Law Nº. 13,979/2020 – when dealing with the issue in Art. 3, §7 (transcribed above) – and the Organic Health Law – when dealing with the competencies of federal entities between Articles 15 and 19 – clarify how the Union, States, Federal District and Municipalities could apply sanitary restrictive measures, therefore, exercise sanitary executive competence. It is noteworthy that Law Nº. 13,979/2020 has the nature of a special law that is more recent in relation to Law 8,080/90 and should be prioritized in its application. In addition, the provision that deals with competencies among federal entities (Art. 3, §7º) for the adoption of the measures has already been amended as a result of Law Nº. 14,035 of August 11, 2020 (BRASIL, 2020n), subsequent, therefore, to the judgment of ADI Nº. 6341.

In this respect, the judgment in the ADI made no reservations, since it only observed that federal entities should follow one of the constitutional guidelines of the SUS, headed in Art. 198, item I, namely: decentralization, with a single direction in each sphere of government. That is, with the adoption of the measures, it referred to the decentralization for the adoption of each of the measures and understood that Law Nº. 13,979/2020 itself would result from its competence to legislate on epidemiological surveillance, under the Organic Law of the SUS, so that the Union would not have exceeded its competence or diminished the competence of other federative entities, but that the other federative entities could and should also protect the fundamental right to health, even because decentralization would imply the municipalization of public health policy.

The problem with the judgment is to confuse legislative and executive powers, stating that Law Nº. 13,979/2020 would be complex in nature. And then, unlike having solved the federative problem with the decision of interpretation according to the CF (BRASIL, 1988), ended up worsening the problem, because all federative entities, without any respect to what determines the CF, began to edit decrees, without corresponding coordinated and cooperative action with states and Union, as it is public and notorious throughout the national territory. And, worse, decrees issued under the argument of adopting sanitary measures, but that did not


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

deal with them but about what would be the essential activities and their operation during certain periods and times, restrictive of the right of individual and economic freedom, changing them daily, according to criteria not exactly technical and not uncommonly political, arising from voter interests and the municipal election period.

This problem about the uncertainty of the interpretation according to the CF (BRASIL, 1988) resulting from the judgment of ADI Nº. 6341 is that it intends to be observed when it comes to the consequences of such judgment for the federative pact, in the next topic of this work.

## 5 CONSEQUENCES FOR THE FEDERATIVE PACT ARISING FROM THE TRIAL OF ADI Nº. 6341

By reading the judgment, the partial transcription of which is made below for better understanding, the Supreme Federal Court understood that the President could dispose, by decree, on public services and essential activities, but that, preserving the attribution of each sphere of government, the other federative entities could also, in accordance with Art. 198, item I, of the Federal Constitution (BRAZIL, 1988).

> Perhaps the conclusion could be to reject the claim. The doubt raised by the requesting Party, however, brings legitimate expectation so far as the competence is exercised, especially in relation to the attribution, delegated to the President, for the definition of essential activities, pursuant to Article 3, § 9, of Law 13,979, 2020. If it is certain that the Union can legislate on the subject, the exercise of this competence must always safeguard the proper performance of the other entities. In this sense, at least from the current procedural stage, this order of ideas supports the caveat then made by Minister Marco Aurelio, on which the concurrent competence to legislate on the subject was based (BRASIL, 2020m, p. 19-20).

It is common in fact that Art. 198, item I, of the CF (BRASIL, 1988) mentioned in the provisions of the judgment, actually concerns executive competence, since it speaks of decentralization and single command in each sphere of the federation, in relation to the SUS, that is, the decentralization directive is not related to legislative


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

competence, but to executive competence, directly related to Art. 23, item II, of the CF (BRASIL, 1988). So much so that this guideline was subsequently reinforced in the Organic Health Law, also related to the competencies of federative entities with a reference to the management and execution of health services and actions.

> The execution of health actions and services, as well as other services of immediate social interest, should be assigned to the agency or authority that is in direct contact with the administered person or user. In addition to being more rational, this procedure allows the user to identify the person responsible for the action, thus increasing the degree of awareness of the citizen and his participation in the government. The municipalization of health actions and services is the great advance of the SUS, because political decentralization is effective, which is the basis of federalism (SANTOS, 2018, p. 166-167). [...] Thus, it is defined that all units of the Federation enter into the execution and formulation of health policy. This in fact presupposes a permanent agreement [...] All federative entities participate in this policy in an articulated way, each at its level [...] Politically, the Constitution paves the way for an agreed model that would require permanent monitoring and evaluation of the entities of the Federation, in order to ensure the functioning of constitutional rules with regard to the functions of each of the levels of the system: Union, states and municipalities. (GERSCHMAN; VIANA, 2005, p. 318-319)

It means that the federative entities in each management scope (Union, states, and municipalities) will exercise their executive powers, about the adoption of restrictive sanitary measures, since these concern health actions and services, maintaining a close relationship with the preservation of the health system itself, so that it does not collapse due to the current pandemic situation.

Nevertheless, the judgment mentioning the possibility for the President to issue a decree to regulate the faithful implementation of Law Nº. 13,979/2020, in order to dispose of public services and essential activities, ended up making the expression equivocal, since it dealt in an equivalent way – as if they were identical powers – the concurrent legislative competence of the federal entities (which it had been dealing with in the previous paragraph of the judgment).

It equated the legislative competence to the constitutional provision that refers to the executive competence, when it comes to decentralization, opening the possibility for the other federative entities to edit autonomous decrees on essential services and activities, without law prior to regency.


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

This is because the decrees that have been edited at the state and municipal level have no correspondence with any law of the respective entities. Thus, the concurrent legislative competence, expressed in Art. 24, item XII, of the CF (BRASIL, 1988), which had been observed and treated by the judgment, including with reference to the principle of preemption in the case of the edition of legislation by the Union, as provided for in the paragraphs of the same article, since it would be responsible for editing rules of a general nature, without excluding the rules of a supplementary nature of the states (Art. 24 , §§ 1 and 2º) and the municipalities (Art. 30, item II), was, obtusely, trans changed/transmuted into the executive competence of Art. 198, item I, in competition with Art. 23, item II, all of the Constitutional Charter.

Starting from the constitutional premise that to the President is destined private jurisdiction to edit decrees for the faithful execution of federal laws, as provided for in Article 84, item IV, of the CF (BRASIL, 1988) and also, by application of the federative principle itself, if it is to be edited decree in a similar character, regarding the essential services and activities within the territories of the states and municipalities, there must be, respectively, state and municipal laws, issued in an additional capacity to Federal Law Nº. 13,979/2020 (including municipal laws must supplement only and to the extent that there is local interest, as provided for in Art. 30, item I, of the CF), for the consequent issue of regulatory decree by the Executive Powers of the same federative entities.

The fact that the Executive Powers of municipalities and states are editing decrees for the regulation of essential services and activities without legal support of their respective Legislative Powers – which could occur through the issue of supplementary laws to the Federal Law – is an action to the federative pact regarding the provisions that regulate the powers provided for in the CF (BRASIL, 1988).

Moreover, it is an offense to the tripartition of the functions of the State itself, directly to Art. 2, of the CF (BRASIL, 1988), one of the foundations of the Republic, because the state and municipal executives when editing regulatory decrees without prior law, are usurping and surpassing the powers conferred on it constitutionally.


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

Not to mention that they are regulating the limits of the exercise of freedom and property when dealing with essential activities, without any legal and constitutional support, directly confronting fundamental rights of citizens.

Now, could states and municipalities edit state and municipal decrees for faithful enforcement of Federal Law Nº. 13,979/2020? Or could such entities edit decrees without their supplementary legislation issued by the Legislative Assemblies and Municipal Councils? Definitely, the answer to both questions should be negative.

First, because the assignment of editing decrees for faithful enforcement of federal law is private to the President, means that it cannot be delegated to anyone else, not even by decision of the Supreme Federal Court or even by Federal Law Nº. 13,979/2020, Art. 3, §9, already updated by Law Nº. 14,035/2020, which authorizes the edition of decrees of the respective municipal and/or state federative authority for the regulation of essential activities.

Second, because the regulatory decree is, as its name says, a regulation of prior law and has limits as to its content, limits that are imposed by the law itself, and are therefore dependent on it. Absent this law, absent the antecedent, there is no way to confer validity to such decrees and because they are illegal, they have no valid basis in the respective law. As mentioned, the law *a priori* must precede the decree *posteriori.* With no law to be regulated, autonomous state and municipal decrees suffer from an insatiable vice of legality.

Apart from the unconstitutionality arising from the usurpation of legislative powers and powers expressly established constitutionally, as to the possibility of legislating concurrent and supplementary to the Union and, which is as serious as the federal pact and the tripartition of powers, unconstitutionality arising from the direct offense to the fundamental rights of liberty and property.

It is one thing for these federal entities to adopt restrictive measures, for which they have executive competence, as already mentioned. Another is, by means of a regulatory decree, to say what would be the essential activities and services within its territory without the respective state and/or municipal supplementary law.


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

Therefore, the understanding that such decrees suffer from a defect of legality and constitutionality, at least, formally, since they are edited autonomously.

Nor do we talk about the constitutional problems related to the matter, since they limit the rights of individual and economic freedom, restricting them by an ampliative interpretation and without legal support, since the measure of social distancing is not provided for by law and only regulated through epidemiological bulletins. Moreover, not surprisingly, it has been treated by the autonomous decrees issued by the municipalities and states of the federation without any participation of the Legislative Power of each of the federative entities.

And to make matters worse, they also offend the very right of equality in its material and formal aspects, since they do not exactly adopt technical criteria to define which kind of establishments remain open or closed and what times, making, for example, in Paraná State, 399 municipalities adopt differentiated measures for exact fundamental rights of individual and economic freedom and, in Brazil, 27 more entities adopt differentiated measures for the same individual and economic freedoms, disregarding the general rule of Federal Law Nº. 13,979/2020 and respective federal regulatory decrees.

Thus, essential activities and services could not be regulated through municipal and state decrees without the respective law of regency, as has been done in Paraná and Brazil abroad.

Nor does the measure of social distancing – an extraordinary restrictive sanitary measure to those legally provided for in Federal Law Nº. 13,979/2020 – because it has no legal provision or express or implicit in federal law, could be imposed through regulatory decrees of the state and municipal executive authorities, without the respective law of regency.

Although social distancing has a close relationship with essential activities and services – it should be noted that the tendency of the population is to look for such services and activities, although not essential, chance remain open – it is not possible, as has already proposed lines above: a) to edit municipal and state regulatory decrees for the faithful execution of Federal Law Nº. 13,979/2020; b) edit

regulatory decrees without municipal and state regency laws; c) restrict or limit rights without commenting on the principle of legality that governs not only civil society as a whole, but also the Public Administration itself, including in sanitary terms.

On the other hand, no less important is to say that the decision of the Supreme Court itself, in judging ADI Nº. 6341, as it did, faced in a scathing and triple qualified manner, if it can be said, constitutional standing clauses relative to: a) the federative pact, as to the division of powers, allowing the 5,570 Brazilian municipalities, plus the 26 states of the federation and the Federal District, each of which – in a total absurd of 5,597 different decrees, in a country with continental dimensions – issued separate decrees without support in law of regency; b) in doing so, authorized that the 5,597 Executive Powers existing in Brazil to supersede the legislative competence of the respective Legislative Assemblies and Councils, therefore, in offense to the tripartition of the powers; c) directly confronted the fundamental rights of individual, economic and property freedom, as it allowed the restriction of such rights through executive decrees; d) directly confronted the fundamental rights of formal and material equality, by allowing the issue of divergent decrees regulating rights in a non-isonomic and equitable way among the citizens of the State.

> Therefore, the natural inadequacy and immense risks that would pose to the essential objectives of the rule of law – above all, repeat, in a country still little suited to more evolved political customs – are visible, of a regulatory power that could define, by force, rights or obligations to do or not make impossible to those administered (MELLO, 2004, p. 337).

Mello's words (2004), mentioned above, are prophetic in the current stage. Decisions like this, still binding, are open the borders to unconstitutionality and the disruption of institutions – institutional crisis that one once sees moving forward between the Executive, Legislative and Judiciary branches. And the worst is that the ordinary legislature, by converting Provisional Measure Nº. 926/2020 into Conversion Project Nº. 25/2020 and, later, with the conversion into Law Nº. 14,035/2020,


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

maintained the understanding that other federative entities could regulate essential activities by decree, without mentioning the need for regency legislation.

In addition, it is perceived, therefore, a convenient and deliberate legislative omission, by the Federal Legislative, which kept the disposition of ADI nº 6341, without the possibility of opposing the binding effects of the merit decision of the Supreme Court, as well as from the Municipal and State´s Legislative, whose position have not been very proactive in the sense of understanding the nature of those decrees and of the own sanitary measure of social distance.

## 6 FINAL CONSIDERATIONS

From what was proposed as a problem of this work, it is possible to conclude some aspects related to the research. As for essential activities, they can be defined as those related to the unavoidable needs of the community, which in not being supplied put at risk the survival, health and safety of the population, and should be observed as much already regulated through Federal Law Nº. 13,979/2020, with subsequent changes by Federal Laws Nº. 14,022/2020 (defines essential services related to the care of women in situations of domestic and family violence, as well as children, adolescents, elderly and people with disabilities) and Nº. 14.0 23/2020 (defined the professionals it considers essential in this pandemic period), as well as the provisions of Federal Executive Decrees Nº. 10,282/2020 (and subsequent changes) and Nº. 10.2 88/2020 (deals with the essential activity of the press) it is worth mentioning that federal law Nº. 7,783/89 should still be considered, which legally defined the activities considered essential for the exercise of the right to strike.

Federal Law Nº. 13,979/2020, amended by Provisional Measure Nº. 926/2020, later converted into Law Nº. 14,035/2020, which concerns the subject of the introduction about competence of the Executive Branch to issue a regulatory decree that defined the essential activities and services, as well as Decree Nº.


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

10,282/2020, all of which were declared constitutional by the Supreme Federal Court, through ADI Nº. 6341.

In turn, Provisional Measure Nº. 926/2020 was converted into Law Nº. 14,035/2020, which prescribes that it will be up to the respective federative authority to define, by decree, what are the essential activities, without any reference to the need for additional legislative action of states and municipalities for the edition of law governing the decree.

From the formal point of view, as to the exercise of the common (executive) powers of Art. 23, item II and Art. 198, item I (decentralization), all of the CF (BRASIL, 1988), the sanitary measure of social distancing, as the other measures, could, in this case, be carried out by the sanitary authorities of federative entities (Union, states and municipalities, in addition to the Federal District), as provided for in Art. 3, §7, of Law Nº. 13,979/2020.

Although adopted throughout the country, the measure of social distancing was not expressly indicated by law, having its validity basis in an infralegal act (epidemiological bulletins of the Health Ministry), so that, as a measure that restricts fundamental rights, it could not be conveyed by regulatory decree of states and municipalities.

It is considered that the decision of the Supreme Court in ADI Nº. 6341 was mistaken since it confused executive powers with legislative powers, by saying that the President could edit the decree on essential activities (legislative competence derived from the existence of permissive in Federal Law Nº. 13,979/2020 and Art. 84, item IV, of the CF), expanding the competence of other federative entities, based on Art. 198, item I, of the CF (executive competence for the promotion of health actions and services in a decentralized manner).

The decision of the Supreme Court, in judging ADI Nº. 6341, as it did, infringed constitutional clauses concerning the federative pact (as to the executive and legislative powers of federal entities); the tripartition of powers (allowed edition of municipal and state executive decrees without support in regency law); the fundamental rights of formal and material equality (authorizing 5,597 different


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

decrees throughout the country) and the fundamental rights of individual, economic and property freedom, with executive acts restricting such rights (if not prohibiting, such as the situation of lockdown and curfews).

Restrictive sanitary measures are included among the executive powers common to federal entities, related to health services and actions, within the scope of the SUS, while the definition of essential activities concerns the concurrent legislative competence among federal entities.

Finally, the Federal Legislative Power, even though it may act differently, deliberately maintained the understanding of the Supreme Federal Court in ADI Nº. 6341, in the sense that the other federative entities could edit decrees on essential activities without, however, mentioning the concurrent and supplementary legislative competence. In addition, in this sense, the state and municipal legislative branches have been omitting in their duty regarding the issue of supplementary laws to Federal Law Nº. 13,979/2020.


[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

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[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]

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[Received/Recebido: Fevereiro 02, 2021; Accepted/Aceito: Março 29, 2021]